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United States Senate

ENVIRONMENT AND PUBLIC WORKS
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COMMITTEES:

COMMISSION ON SECURITY AND COOPERATION IN EUROPE

August 14, 2013

The Honorable Jacob J. Lew Secretary Department of the Treasury 1500 Pennsylvania Avenue, N.W. Washington, D.C. 20220

The Honorable Daniel Werfel Acting Commissioner Internal Revenue Service Tenth Street and Pennsylvania Avenue N.W. Washington, D.C. 20004

Dear Secretary Lew and Acting Commissioner Werfel:

In the wake of the Supreme Court's historic decision in *United States v. Windsor* ("Windsor" or "Decision"), which ruled the *Defense of Marriage Act* ("DOMA") unconstitutional, I am writing to urge you to consider the Decision's tax implications for same-sex couples. Specifically, I urge that you resolve the issues outlined below.

- 1. Need for clear guidance. Pursuant to Windsor, same-sex couples who hold a valid marriage license issued by a U.S. state or a foreign country are now considered married under federal law, including for federal income tax purposes. Likewise, each party to such a marriage is considered a spouse wherever that term is found in the Tax Code. The Decision must be applied prospectively from when it was issued on June 26, 2013. Especially for taxpayers in same-sex marriages who, perhaps anticipating the Windsor decision, filed extensions for their 2012 returns, it is critical that the Internal Revenue Service promptly issue guidance confirming their filing status. Given the scope of impacted taxpayers, the IRS's guidance should be issued as soon as possible and, eventually, be made into a separate IRS Publication, and should address each of the points further below.
- 2. <u>State of celebration rule.</u> While some have suggested uncertainty as to whether Windsor requires federal agencies, including the IRS, to recognize only same-sex marriages that are recognized in the couple's state of domicile, I reject such a theory. Rather, the Service should continue to follow its own precedent, Revenue Ruling 58-66, which extends recognition to a marriage that is lawful in the state of creation, irrespective of whether the spouses' state of domicile recognizes the marriage. This precedent for recognizing marriages despite a couple's move to a state without similar marriage laws is essential not only for fairness, but also to ensure administrability of the tax laws.
- 3. Retroactivity. It would appear also that *Windsor* has retroactive effect, at least for open tax years. The Service should allow impacted taxpayers to voluntarily elect to amend returns and receive any refunds, credits, or carry-forwards that may be available because of a newly filed return. However, given that pre-*Windsor*, married same-sex couples were prohibited from filing joint returns, it would be inappropriate for the Service to

audit, make assessments, or otherwise challenge such a couple's decision not to amend their returns. You should use your statutory authority to make clear that Treasury and the Service will not pursue such actions.

4. <u>Civil unions</u>. While the *Windsor* Court did not address civil unions, eight states allow such unions and have generally understood them to provide same-sex couples with the same legal rights and responsibilities as those that apply to opposite-sex married couples. In fact, parties to a civil union are generally considered "spouses" under the laws of those states that sanction civil unions. Therefore, it is important for the Service to address whether civil unions in states that consider parties to such unions as spouses will be treated as marriages for federal tax purposes.

Given the importance of predictability and clarity in the application of our tax rules for financial planning, I urge the Service to move as expeditiously as possible to issue guidance as to how the law will be applied to married same-sex couples.

Sincerely,

Benjamin L. Cardin United States Senator

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